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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

OPERATING ENGINEERS & PARTICIPATING EMPLOYERS PRE-APPRENTICE, APPRENTICE AND JOURNEYMAN AFFIRMATIVE ACTION TRAINING FUND, and THE OPERATING ENGINEERS JOINT APPRENTICESHIP COMMITTEE FOR NORTHERN CALIFORNIA,
Petitioners,

v.

WEISS BROS. CONSTRUCTION CO. dba WEISSCAL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California

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BRIEF *AMICI CURIAE* OF SEVEN APPRENTICESHIP TRAINING TRUST FUNDS AND U.A. LOCAL NO. 393 IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a contract for apprenticeship training between an employer, a state, and an apprenticeship training trust fund, operating under a state apprenticeship training program recognized by the United States Department of Labor, is unenforceable by the trust fund because the Employee Retirement Income Security Act does not expressly authorize employee benefit trust funds to enforce such contracts in a private cause of action.

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BRIEF *AMICI CURIAE* OF SEVEN APPRENTICESHIP TRAINING TRUST FUNDS AND U.A. LOCAL NO. 393 IN SUPPORT OF PETITIONERS

Come now the Amici Curiae, Pipe Trades District Council No. 36 Apprenticeship Training Fund, U.A. Local No. 343 Journeyman and Apprentice Training Trust Fund, U.A. Local No. 342 Apprenticeship and Training Trust Fund, Pipe Trades Apprentice and Journeymen Training Trust Fund for San Mateo County, Insulation and Asbestos Industry Workers of Northern California and

Local No. 16 Apprentice Training Trust Fund, Operative Plasterers Local Union No. 66 Journeyman and Apprentice Training Trust Fund, and Sacramento-Stockton Plastering Industry Joint Apprenticeship and Training Trust Fund (hereinafter the Trust Funds), and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union No. 393 (hereinafter U.A. Local No. 393), and submit this brief in support of the Petition for Writ of Certiorari in No. 90-1191.

INTEREST OF THE AMICI CURIAE

The Trust Funds are multiemployer trust funds, established pursuant to Section 302(c) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 186(c). All of the Trust Funds are employee welfare benefit trust funds within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, *et seq.* The Trust Funds administer apprenticeship training programs which have been approved by the California Division of Apprentice Standards, which itself is regulated by the United States Department of Labor Bureau of Apprenticeship Training. U.A. Local No. 393 appoints Trustees or directors to two apprenticeship training programs approved by the Division of Apprenticeship Standards. The Trust Funds appear on their own behalf and on behalf of their enrolled apprentice trainees. U.A. Local No. 393 appears on behalf of its members who are apprentice trainees in one of the apprenticeship training programs with which it is affiliated.

The Amici's apprenticeship training programs have been successfully operating continuously since the 1950's. They have trained thousands of apprentices, under rigorous four- or five-year programs. A substantial portion of the on-the-job experience of these apprentices has been on public works of construction. In the operation of their training programs, the Trust Funds and the U.A. Local

No. 393 apprenticeship training programs enter into numerous tripartite contracts of apprenticeship training, called DAS-7 agreements, with the State of California and building and construction contractors on public works jobs in California. The enforceability of these agreements was the subject matter of the case at hand. If the Court does not grant certiorari, and reverse the opinion below, the Trust Funds and the U.A. Local No. 393 apprenticeship training programs will not be able to enforce their contracts of apprenticeship training, which will adversely affect their ability to provide apprenticeship training to all of the employees covered under their training programs. Furthermore, the ability of all apprentices, whether in a union-sponsored apprenticeship program or not, to gain the on-the-job experience essential to apprenticeship training, will be harmed if the State of California is held to be powerless to enforce a requirement that contractors employ apprentices as part of their obligation under their contract for a work of public construction.

SUMMARY OF ARGUMENT

1. The Court should grant certiorari in this case because the California Court of Appeal has interfered with the operation of the National Apprenticeship Act (the Fitzgerald Act), by improperly finding enforcement of contracts for apprenticeship training under that Act preempted by Section 514(a) of the Employee Retirement Income Security Act.

a. The federal laws governing apprenticeship training establish a system of cooperation among federal and state governments, employers, and apprenticeship training programs, under which all of those parties have duties, in order to fulfill the purposes of the Fitzgerald Act.

b. As a matter which is regulated by federal law, contracts for apprenticeship training are saved from preemption under Section 514(a) of the Employee Retirement Income Security Act by Section 514(d).

2. The California Court of Appeal erred in finding that enforcement of a contract for apprenticeship training relates to an employee benefit plan under the Employee Retirement Income Security Act.

a. The Court and numerous lower courts have recognized limitations on the subject matter covered under the Employee Retirement Income Security Act and the scope of preemption by that Act.

b. A building and construction contractor's decision to enter into a contract for apprenticeship training is a business decision, which is beyond the scope of the Employee Retirement Income Security Act, and therefore not preempted by it.

REASONS THE WRIT SHOULD ISSUE

I. CERTIORARI SHOULD ISSUE BECAUSE THE CALIFORNIA COURT OF APPEAL INTERFERED WITH THE OPERATION OF THE NATIONAL APPRENTICESHIP ACT, BY IMPROPERLY FINDING ENFORCEMENT OF CONTRACTS OF APPRENTICESHIP TRAINING UNDER THAT ACT PREEMPTED BY SECTION 514(a) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT.

The primary law governing the education of apprentices in the United States is the National Apprenticeship Act of 1937, 29 U.S.C. Section 50, otherwise known as, and hereinafter referred to as the Fitzgerald Act. (Appendix A, *infra.*) In accordance with powers conferred by the Fitzgerald Act, the United States Department of Labor, through the Bureau of Apprenticeship Training, has developed a comprehensive program of apprenticeship regulations and practices. 29 C.F.R. Sections 29.1-29.13 (1990).

The history of federal laws on apprenticeship reflects the intent of Congress to have federal law control the subject matter, but not to the exclusion of states and private parties where they serve federal purposes. In 1937,

Congress envisioned that state agencies, employers, and labor would each have a role in apprenticeship training programs. This can be seen from the Fitzgerald Act itself which specifically instructs the Secretary of Labor to "bring together employers and labor for the formulation of programs of apprenticeship, [and] to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship . . . ." 29 U.S.C. Section 50.

Although the Court has never addressed the role of the various parties involved, lower courts have recognized the cooperative nature of apprenticeship law. For example, in *Siuslaw Concrete Const. v. Washington Dept. of Transportation*, 784 F.2d 952 (9th Cir. 1986), the Ninth Circuit upheld state regulation of the wages of uncertified apprentices on a highway construction project which was subject to federal regulation under the Fitzgerald Act and the Federal Aid-Highways Program, 23 U.S.C. Sections 101-158, and in particular 23 U.S.C. Section 113(c), which incorporated certified apprenticeship programs. *See also Boise Cascade Corp. v. Peterson*, 735 F. Supp. 1434 (D. Minn. 1990) (upholding state apprenticeship training program.)

Since the passage of the Fitzgerald Act, Congress has altered the role of the various parties involved in apprenticeship training, but has not altered the basic cooperative nature of the apprenticeship system. The Taft-Hartley Act of 1947 established the current system of fringe benefit trust funds, jointly administered by labor and management. Section 302(c)(6) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 186(c)(6). While this limited the role of labor, the primary effect has been to institutionalize labor-management cooperation in the provision of all fringe benefits, including apprenticeship training.

In 1974, Congress further regulated the roles of employers, labor and trustees by enacting the Employee

Retirement Income Security Act, 29 U.S.C. Sections 1001 *et seq.* (hereinafter ERISA). ERISA expressly preempts state laws which relate to an employee benefit plan, with certain limited exceptions. Section 514(a) of ERISA, 29 U.S.C. Section 1144(a). However, Congress also made it clear that ERISA was not intended to undermine the operation of other federal laws:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in Sections 1031 [concerning prior law] and 1137(c) [concerning the role of employees of the United States in regulation of private trust funds] of this title, or any rule or regulation issued under any such law.

ERISA Section 514(d), 29 U.S.C. Section 1144(d). With respect to apprenticeship training, the effect of Section 514(d) is to preserve the Fitzgerald Act, and the cooperative system which it established.

The California law at issue, California Labor Code Section 1777.5 (Appendix B, *infra*), is part of that cooperative system. California's apprenticeship program has been recognized by the Bureau of Apprenticeship Training, under Section 29.12 of the Bureau's regulations issued under the Fitzgerald Act. Section 1777.5 itself establishes a cooperative program among the State of California, employers, and apprenticeship training trust funds. Section 1777.5 requires that contractors on public works employ apprentices from a recognized apprenticeship training program, and contribute to that training program. The DAS-7 agreement is the contract for apprenticeship training among the State, the apprenticeship training program, and the contractor, in which the parties agree to fulfill their various duties, and which allows private enforcement if a party fails to fulfill its duties.

Enforcement of DAS-7 agreements by joint labor-management trust funds is essential to the operation of this federally-recognized apprenticeship training program

and to the purposes of the Fitzgerald Act. Joint trust funds depend almost exclusively on contributions from contractors whose employees receive the benefits of the funds' apprenticeship programs. If DAS-7 agreements cannot be enforced, the ability of joint trust funds to provide apprentice training will be seriously harmed. The Ninth Circuit has already denied apprenticeship training trust funds a federal forum for actions to enforce DAS-7 agreements in *Hydrostorage, Inc. v. Northern Calif. Boilermakers Local Joint Apprenticeship Comm.*, 891 F.2d 719 (9th Cir. 1989), *cert. denied*, —— U.S. ——, 111 S. Ct. 72, 112 L.Ed.2d 46 (1990). The effect of the decision below in this case would be to prevent apprenticeship training trust funds from taking legal action to receive compensation for training they provide to the employees of contractors on California public works. Certiorari should issue, and the opinion below be reversed, to protect the operation of the Fitzgerald Act through cooperation between the federal and state governments, employers and labor. Apprenticeship training in all fifty states will be crippled until this issue is resolved by this Court.

II. THE CALIFORNIA COURT OF APPEAL ERRED IN FINDING THAT ENFORCEMENT OF A CONTRACT FOR APPRENTICESHIP TRAINING "RELATE[S] TO AN EMPLOYEE BENEFIT PLAN" UNDER SECTION 514(a) OF ERISA.

The scope of preemption of state laws by ERISA is limited to laws which "relate to any employee benefit plan . . . ." ERISA Section 514(a), 29 U.S.C. Section 1144(a). The Court has declared that Section 1144(a) is to be read broadly, and encompasses any law which "has a connection with, or reference to [an employee welfare benefit] plan." *Shaw v. Delta Air Lines*, 463 U.S. 85, 96-97, 103 S. Ct. 2890, 77 L.Ed.2d 490 (1983). A broad reading of Section 514(a) serves to "round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." 463

U.S. at 99. Broad preemption of state law is particularly relevant when the subject law provides a greater remedy *against a plan* than authorized by federal law, one effect of which would be to reduce the benefits payable to other beneficiaries. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L.Ed.2d 39 (1987). *See also Massachusetts Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L.Ed.2d 96 (1985) (No punitive damages may be awarded against Trustees); and *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S. Ct. 478, 112 L.Ed.2d 474 (1990) (State law remedy for violation of employee's right under ERISA held preempted.)

However, the Court has also recognized limitations on the preemption of state law by Section 514(a). In *Mackey v. Lanier Collections Agency*, 486 U.S. 825, 108 S. Ct. 2182, 100 L.Ed.2d 836 (1988), the Court upheld the application of a state garnishment law to welfare benefit plans. The welfare benefits which the state sought to attach were not within the scope of ERISA's anti-alienation clause or otherwise protected from garnishment. The Court was not willing to use Section 514(a) to expand the anti-alienation clause, which would have had the effect of preempting a garnishment law of general application. 486 U.S. at 836-37.

In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S. Ct. 2211, 96 L.Ed.2d 1 (1987), the Court also upheld a state law requiring the payment of severance pay. The Court rejected the argument that "'plan' should in effect be read out of [Section 514(a)]." 482 U.S. at 8. The Court drew a distinction between laws that regulated plans, which were preempted, and those that regulated only benefits, which were not. Furthermore, preemption of the subject state law would not have served the purposes of preemption. 482 U.S. at 10-12.

The preemption of California Labor Code Section 1777.5 would not promote any of the policy concerns which led to the results in the cited cases. First, the threat of in-

consistent regulation of apprenticeship training programs is minimal. No state agency may regulate apprenticeship training programs without the approval of the United States Department of Labor Bureau of Apprenticeship Training. While there may be variations in training programs, these are no different from the variations in the welfare benefits provided under other ERISA-covered plans.

Second, California Labor Code Section 1777.5 is a law of general application which should not be preempted by ERISA. All building and construction contractors who work on California public works are covered by that law. However, employers may provide the required apprenticeship training in a variety of ways. An employer may operate its own training program, or enter into an agreement with a joint labor-management trust fund or with a multiple employer plan (with no labor participation). *See, e.g., Associated Builders & Contractors, Inc. v. McDonald,* 731 F. Supp. 966 (D. Nev. 1989). In other words, the existing apprenticeship training system is a multi-faceted approach, which does not require contributions to joint labor-management trust funds. However, when an employer elects that option, the purposes of ERISA and the Fitzgerald Act are served by allowing the trust fund with whom the employer has contracted for apprenticeship training services to enforce that contract.

Third, and most importantly, the Court must not allow the lower courts to abolish the distinction recognized in *Fort Halifax Packing.* The primary purpose of ERISA is to assure the participants and beneficiaries of employee benefit plans that they would receive the benefits which an employer has promised to provide. However, the decision to provide benefits is a business decision, which is not within the scope of ERISA, and therefore, not within the scope of preemption by ERISA. *See, e.g., Moore v. Reynolds Metals Co. Retirement Program,* 740

F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109, 105 S. Ct. 786, 83 L.Ed.2d 780 (1985) ("Neither Congress nor the Courts are involved in the decision to establish a plan or in the decision concerning which benefits a plan should provide," citing H. Rep. No. 93-807, 93rd Cong. 2d Sess. (1974), U.S. Code Cong. and Admin. News 4670, 4677.)

The Court has not had occasion to address this distinction since *Fort Halifax Packing*, and some members of the Court questioned the distinction drawn in that case when that decision was rendered. 482 U.S. at 23-26, White, J. dissenting. However, the distinction between business decisions and ERISA-covered administrative actions is a valuable tool which courts have used often to determine where the broad scope of ERISA ends. This distinction is particularly valuable where there is a federally-regulated apprenticeship training program, and the business decision is how an employer will fulfill its obligations under that program.

Lower courts have applied this distinction in numerous contexts. For example, in *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020, 109 S. Ct. 1745, 104 L.Ed.2d 182 (1989), the Sixth Circuit held that the company's decision to terminate retiree welfare benefits was a business decision, outside the scope of ERISA fiduciary duties. In *Phillips v. Amoco Oil Co.*, 789 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016, 107 S. Ct. 1893, 95 L.Ed.2d 500 (1987), the Eleventh Circuit held that the terms of a purchase and sale agreement were a matter for the employer acting as employer, and therefore not within the scope of ERISA. And again in *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3rd Cir. 1990), the Third Circuit held that the company's decision to terminate a severance plan was a business decision, and therefore not covered by ERISA.

Just like a decision to provide those other benefits, an employer's decision how to provide apprenticeship training is not covered under ERISA. Extending ERISA preemption to prevent enforcement of DAS-7 agreements by trust funds encroaches on business decisions not covered by ERISA, and poses a threat of extending ERISA itself into matters which Congress clearly intended to be free from regulation under that Act. The Court can prevent that result only by granting certiorari and reversing the decision below.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

National Apprenticeship Act (Fitzgerald Act),
Section 1,
29 U.S.C. § 50

Section 50. Promotion of labor standards of apprenticeship

The Secretary of Labor is authorized and directed to formula and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare in accordance with section 17 of Title 20. . .

APPENDIX B

California Labor Code,
Section 1775
(West, 1989 Cumul. Pocket Part)

§ 1777.5 Employment of registered apprentices; wages; standards; number; apprenticeable craft or trade exemptions; contributions

Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he is employed, and shall be employed only at the work of the craft or trade to which he is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing at Section 3070), Division 3, of the Labor Code, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which he is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract employs workmen in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected; provided, however, that the approval as established by the joint apprenticeship committee or committees shall

be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but in no case shall the ratio be less than one apprentice for each five journeymen, except as provided in this section.

The contractor or subcontractor if he is covered by this section upon the issuance of the approval certificate, or if has has been previously approved in such craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he employs apprentices in such craft or trade in the state on all of his contracts on an annual average of not less than one apprentice to each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 ratio as set forth in this section. This section shall not apply to contracts of general contractors involving less than thirty thousand dollars ($30,000) or 20 working days or to contracts of specialty contractors not bidding for work through a general or prime contractor, involving less than

two thousand dollars ($2,000) or fewer than five working days.

"Apprenticeable craft or trade," as used in this section, shall mean a chaft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) In the event unemployment for the previous three-month period in such area exceeds an average of 15 percent, or

(b) In the event the number of apprentices in training in such area exceeds a ratio of 1 to 5, or

(c) If there is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either (1) on a statewide basis, or (2) on a local basis.

(d) If assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned or of such a nature that training cannot be provided by a journeyman.

When such exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, provided thay are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of the public work, to which fund or funds other contractors in the era of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of such contributions in computing his bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of such contributions to the fund of funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to the provisions of Section 3081.